UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SUMMARY OF PRINCIPLES REGARDING OPENING STATEMENTS AND CLOSING ARGUMENTS FROM FIRST CIRCUIT AUTHORITY AND LOCAL RULES

For the guidance of the Bar, Judge D. Brock Hornby and his law clerks compiled this summary of principles regarding opening statements and closing arguments from First Circuit opinions and the Local Rules of the District of Maine. Beginning in 2019, this summary has been updated by Chief Judge Jon D. Levy and his law clerks.

This summary does not represent an opinion of the Court as to the proper outcome of any particular issue that may arise during trial. It is open to counsel to seek to persuade the presiding judge that a particular principle may not be applicable or correct.

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I. GENERALLY

A. A LAWYER MAY NOT:

1. Give an argumentative opening statement. D. Me. Local R. 39(a).

2. Express his or her personal opinion. United States v. Grabiec, 96 F.3d 549, 550 (1st Cir. 1996) ("[W]e have long held that counsel must not express a personal opinion."); Polansky v. CNA Ins. Co., 852 F.2d 626, 627-28 (1st Cir. 1988); Marchant v. Dayton Tire & Rubber Co., 836 F.2d 695, 703 (1st Cir. 1988); United States v. Cresta, 825 F.2d 538, 555 (1st Cir. 1987).

3. Misstate the evidence. Gonzalez-Marin v. Equitable Life Assurance Soc'y of U.S., 845 F.2d 1140, 1147 (1st Cir. 1988); United States v. Santana-Camacho, 833 F.2d 371, 372-75 (1st Cir. 1987).

4. Make irrelevant references designed to inflame the passions and prejudices of the jury, or use arguments that would lead the jury to decide the case on considerations other than the evidence. Alvarado-Santos v. Dep't of Health, 619 F.3d 126, 136 (1st Cir. 2010) ("[I]nflammatory arguments to the jury based on the Dominican nationality of some individual defendants . . . are 'clearly prohibited conduct' and have no place in a court of law."); Arrieta-Agressot v. United States, 3 F.3d 525, 527 (1st Cir. 1993) (finding "superheated rhetoric from the government urging jurors to enlist in the war on drugs" inflammatory and impermissible); United States v. Machor, 879 F.2d 945, 954-56 (1st Cir. 1989); United States v. Doe, 860 F.2d 488, 492-94 (1st Cir. 1988) (citing ABA Standard for Criminal Justice 4-7.8); Polansky v. CAN Ins. Co., 852 F.2d 626, 630 (1st Cir. 1988) (citing Fed. R. Evid. 403 advisory committee's note); United States v. Giry, 818 F.2d 120, 132-34 (1st Cir. 1987); Warner v. Rossignol, 538 F.2d 910, 911-13 (1st Cir. 1976).

5. Engage in wild speculation. See United States v. de Leon Davis, 914 F.2d 340, 344-45 (1st Cir. 1990) (concluding that prosecutor's "comments approach[ed] the outer limits of permissible argument" when based on "conjecture, but not wild speculation").

6. Use the "golden rule" argument, i.e., ask the jurors to put themselves in the shoes of a victim. United States v. Kirvan, 997 F.2d 963, 964 (1st Cir. 1993); see also United States v. Moreno, 947 F.2d 7, 8 (1st Cir. 1991) (concluding that a prosecutor did not invoke improper "golden rule" argument); Forrestal v. Magendantz, 848 F.2d 303, 308-10 (1st Cir. 1988). But a lawyer may ask the jurors to put themselves in the position of an eyewitness to test the plausibility of a witness's testimony. United States v. Kirvan, 997 F.2d 963, 963 (1st Cir. 1993).

7. Assert that the opposing party has "concocted 'stories' with the connivance of his lawyer." Wilson v. Town of Mendon, 294 F.3d 1, 16 (1st Cir. 2002).

II. CIVIL CASES SPECIFICALLY

A. A LAWYER MAY NOT:

1. Disclose the *ad damnum* to the jury. Wilson v. Bradlees of New England, Inc., 250 F.3d 10, 23 n.25 (1st Cir. 2001) ("reversible error" to allow lawyer to argue *ad damnum* to jury); Davis v. Browning-Ferris Indus., Inc., 898 F.2d 836, 837-38 (1st Cir. 1990).

2. Request a dollar amount for pain and suffering. Bartlett v. Mutual Pharm. Co., Inc., 678 F.3d 30, 42 n.7 (1st Cir. 2012) ("[A]llowing counsel to do so was error under First Circuit precedent," but no reversal where opposing counsel assented), *rev'd on other grounds* 570 U.S. 472. The First Circuit has explained:

> We forbid counsel from asking jurors to consider the amount of a party's *ad damnum* in crafting a damage award, and we have cited approvingly a case outside this circuit for the point that lawyers cannot state in summation the number they think jurors should award for pain and suffering. Building on this foundation, we held in an unpublished opinion that [our precedent] precludes counsel from requesting a pain-and-suffering dollar amount in closing.

Bielunas v. F/V Misty Dawn, Inc., 621 F.3d 72, 79 (1st Cir. 2010) (citations omitted) (finding no plain error where no objection was made).

** Note that this differs from Maine's state practice, which permits counsel to suggest a specific dollar amount for pain and suffering. See Hartt v. Wiggin, 379 A.2d 155, 158 (Me. 1977) ("The suggestion . . . of a specific dollar amount for pain and suffering [during closing argument] is not objectionable in itself.").

3. Ask the jury to put themselves in the shoes of a plaintiff to determine damages. Forrestal v. Magendantz, 848 F.2d 303, 308-10 (1st Cir. 1988); see also Granfield v. CSX Transp., Inc., 597 F.3d 474, 491 (1st Cir. 2010) ("There can be little doubt that suggesting to the jury that it put itself in the shoes of a plaintiff is improper. The walking in plaintiff's shoes argument, or as it is sometimes called, the Golden Rule argument, has been 'universally condemned because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than evidence.'" (citations omitted)).

4. Refer to insurance coverage when it is not at issue. Polansky v. CNA Ins. Co., 852 F.2d 626, 630 (1st Cir. 1988) (citing City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 758 (6th Cir. 1980)); see also Roy v. Star Chopper Co., Inc., 584 F.2d 1124, 1135 (1st Cir. 1978).

5. Appeal to the emotions of the jury by contrasting the financial positions of the parties. See Gonzalez-Marin v. Equitable Life Assurance Soc'y of U.S., 845 F.2d 1140, 1147-48 (1st Cir. 1988).

6. Make purely emotional appeals to the jury designed only to stain character: for example, saying that a defendant "does not care" about the plaintiff. Smith v. Kmart Corp., 177 F.3d 19, 26 (1st Cir. 1999).

7. Ask for damages as punishment in a nonpunitive damage case. Smith v. Kmart Corp., 177 F.3d 19, 27 (1st Cir. 1999).

8. Ask the jury for an additional sanction for pretrial discovery conduct where the court has already determined what the sanction will be. Smith v. Kmart Corp., 177 F.3d 19, 26 (1st Cir. 1999).

III. CRIMINAL CASES SPECIFICALLY

A. A PROSECUTOR MAY NOT:

1. Directly accuse a defendant of lying. United States v. Saad, 888 F.3d 561, 569-71 (1st Cir. 2018); see also United States v. Rodríguez-DeJesús, 202 F.3d 482, 486 (1st Cir. 2000); United States v. Nickens, 955 F.2d 112, 121 (1st Cir. 1992); United States v. Rodriguez-Estrada, 877 F.2d 153, 158-59 (1st Cir. 1989); United States v. Garcia, 818 F.2d 136, 143-44 (1st Cir. 1987).

2. "[I]nject personal beliefs about the evidence into a closing argument." United States v. Nickens, 955 F.2d 112, 121 (1st Cir. 1992); see also United States v. Castro-Davis, 612 F.3d 53, 66-67 (1st Cir. 2010) (improper for prosecutor to say, "I think her testimony was very clear . . ." and "[i]t seems to me, and I submit to you, that [the witness] is right on the money"); United States v. Auch, 187 F.3d 125, 131 (1st Cir. 1999) ("'[T]he only way *I can even imagine* ever acquitting this man of the charges is if you totally disbelieve [the government's cooperating witness].'"); United States v. Cresta, 825 F.2d 538, 555 (1st Cir. 1987).

3. Assert his or her personal belief in the defendant's guilt. United States v. Smith, 982 F.2d 681, 683-84 (1st Cir. 1993); United States v. Adams, 305 F.3d 30, 37 (1st Cir. 2002) ("'We're not trying to prosecute anyone that is innocent' . . . . should not have been said because it arguably invited the jury to rely upon the prosecutor's implied expression of personal belief in [defendant's] guilt."); United States v. Andújar-Basco, 488 F.3d 549, 560-61 (1st Cir. 2007) (improper to say "I feel comfortable and the United States feels comfortable that they have proven beyond a reasonable doubt" or "I have proven it, absolutely. We have met our burden.").

4. Use "pejorative language and inflammatory rhetoric," United States v. Rodriguez-Estrada, 877 F.2d 153, 159 (1st Cir. 1989) (prosecutor called the defendant a "liar" and "crook" and remarked that he had the courage to call him those names), or overuse "a potentially inflammatory phrase . . . in some exaggerated circumstances." United States v. Sánchez-Berríos, 424 F.3d 65, 73-74 (1st Cir. 2005) (prosecutor referred to "corrupt officers," where defendants were police officers who transported drugs at the direction of an undercover F.B.I. agent); see also United States v. Carpenter, 494 F.3d 13, 23 (1st Cir. 2007) (prosecutor repeatedly used gambling metaphor in closing).

5. Vouch for the credibility of a witness. In 2015, the First Circuit summarized its improper vouching precedents in United States v. Vázquez-Larrauri, 778 F.3d 276, 284 (1st Cir. 2015):

> [S]everal forms of credibility argument plainly cross over into improper vouching. The first form occurs when the prosecutor tells the jury that the prosecutor takes personal responsibility or ownership of the case and thus directly places the government's credibility at issue. See, e.g., United States v. Rojas, 758 F.3d 61, 64 (1st Cir. 2014) ("[I]f you have any issues with the way this investigation was run, blame me. I'm in charge. I'm responsible."); United States v. Josleyn, 99 F.3d 1182, 1197 (1st Cir. 1996) ("I'm a married person with a family, and I go home at night with a sound conscience. I have worked very hard on this case. . . . And we are very proud of what we have done. We have done nothing to be ashamed of."). The second form of prohibited vouching occurs when the prosecutor "impart[s] her personal belief in a witness's veracity," Pérez-Ruiz, 353 F.3d at 9, or in the defendant's guilt, see United States v. Andújar-Basco, 488 F.3d 549, 560-61 (1st Cir. 2007) ("I feel comfortable and the United States feels comfortable that they have proven beyond a reasonable doubt that this man delivered five kilograms of cocaine."). Bare assertions that a witness was honest or correct are therefore improper. See, e.g., United States v. Rodríguez-Adorno, 695 F.3d 32, 40 (1st Cir. 2012) ("Was [the passenger] credible? Was he honest? Of course, he was." (alteration in original)); United States v. Gomes, 642 F.3d 43, 46 (1st Cir. 2011) (telling a jury that a police detective "gave you honest, candid, truthful testimony" (emphasis removed)); United States v. Castro-Davis, 612 F.3d 53, 67 (1st Cir. 2010) ("I think [the identity witness's] testimony was very clear . . . . It seems to me, and I submit to you, that [the witness] is right on the money." (emphasis removed)).

A prosecutor risks engaging in improper vouching by:

(a) invoking the credibility of the government. United States v. Page, 521 F.3d 101, 107 (1st Cir. 2008) ("A prosecutor impermissibly vouches for a witness only if he places the prestige of his office behind the government's case by adverting to his own personal belief and trust in the witness's truthfulness . . . ."); United States v. Cormier, 468 F.3d 63, 73-74 (1st Cir. 2006) (same); United States v. Pérez-Ruiz, 353 F.3d 1, 9 (1st Cir. 2003) (improper vouching also includes "implying that the jury should credit the prosecution's evidence simply because the government can be trusted."); United States v. Grant, 971 F.2d 799, 811 n.22 (1st Cir. 1992) (en banc).

(b) placing his or her own credibility or character at issue. United States v. Rojas, 758 F.3d 61, 64 (1st Cir. 2014) ("There is no question that the prosecutor in this case improperly used his own personal credibility, and therefore that of the government, to vouch for the prosecution's investigation and witnesses. . . . [T]he prosecutor in effect testified that he ran the investigation, and that any flaws in it were therefore not probative on the question of the witnesses' credibility."); United States v. Joyner, 191 F.3d 47, 55

(1st Cir. 1999) ("When a prosecutor places the credibility of counsel at issue, the advantage lies solidly with the government, and thus, prosecutors are prohibited from doing so."); United States v. Josleyn, 99 F.3d 1182, 1196-97 (1st Cir. 1996); United States v. Rosales, 19 F.3d 763,766-67 (1st Cir. 1994); United States v. Whiting, 28 F.3d 1296, 1303 (1st Cir. 1994); United States v. Newton, 891 F.2d 944, 952-53 (1st Cir. 1989) ("[G]overnment attorneys must not use the tremendous personal credibility that inures to them because they represent the government."); United States v. Martin, 815 F.2d 818, 821-22 (1st Cir. 1987) (citing United States v. Sims, 719 F.2d 375, 377 (11th Cir. 1983)).

(c) indicating that information not presented to the jury supports the witness's testimony. United States v. Auch, 187 F.3d 125, 131 (1st Cir. 1999); United States v. Grant, 971 F.2d 799, 811 n.22 (1st Cir. 1992) (en banc) ("Improper vouching occurs where . . . the prosecutor 'implicitly vouch[es] for the witness' veracity by indicating that information not presented to the jury supports the testimony.'" quoting United States v. Martin, 815 F.2d 818, 821-22 (1st Cir. 1987)).

(d) asserting that a witness is telling the truth, or otherwise commenting on the credibility of a witness. United States v. Saad, 888 F.3d 561, 569-71 (1st Cir. 2018) (disapproving the use of the term "liar," along with other language suggesting the prosecutor's personal belief about the credibility of the defendant and a defense witness); United States v. Rodríguez-Adorno, 695 F.3d 32, 40-41 (1st Cir. 2012) (disapproving the rhetorical questions (and answer): "Was [the passenger] credible? Was he honest? Of course, he was."); United States v. Gomes, 642 F.3d 43, 45 (1st Cir. 2011) (government conceded it crossed the line into vouching when prosecutor stated in closing that a detective "gave you honest, candid, truthful testimony."); United States v. Landry, 631 F.3d 597, 605-06 (1st Cir. 2011) (prosecutor's statement that the government "went at great length here not just to bring a regional investigator, not to bring someone local, but to make sure we got the right person" constituted "improper bolstering of the credibility of the Government's expert witnesses"); United States v. Wihbey, 75 F.3d 761, 771-72 (1st Cir. 1996); United States v. Levy-Cordero, 67 F.3d 1002, 1008 (1st Cir. 1995); United States v. Sutherland, 929 F.2d 765, 775-76 (1st Cir. 1991)(("[T]he phrase 'he will be honest with you,' while literally constituting vouching, 'was the sort of borderline lapse which, at most, amounted to harmless error.'" (quoting United States v. Martin, 815 F.2d 818, 823 (1st Cir. 1987)); United States v. Rodriguez-Estrada, 877 F.2d 153, 158 (1st Cir. 1989). But see United States v. Auch, 187 F.3d 125, 131-32 (1st Cir. 1999) (concluding that prosecutor's statements that a cooperating witness "had told the truth, that he had acted like an honest man, and that [his] life would be over if he had lied during the trial" were proper to the extent they referred to the witness's motive to tell the truth).

(e) stating that prosecution witnesses are bound to tell the truth. United States v. Manning, 23 F.3d 570, 572-73 (1st Cir. 1994).

(f) stating that he or she (the prosecutor) would have acted similarly to how the witness acted. United States v. Palmer, 203 F.3d 55, 58 (1st Cir. 2000).

(g) asking the jury "to believe the police or FBI because of their history, integrity, or public service," because it "invite[s] the jury to rely on the prestige of the government

and its agents rather than the jury's own evaluation of the evidence . . . ." United States v. Torres-Galindo, 206 F.3d 136, 142 (1st Cir. 2000); see also United States v. Santana-Pérez, 619 F.3d 117, 123 (1st Cir. 2010) ("troubling" to say or imply that "Coast Guard witnesses should be believed 'simply because they are Coast Guard officers'"); United States v. Kornegay, 410 F.3d 89, 96 (1st Cir. 2005) ("[S]tatements such as these, which arguably ask the jury to believe the testimony of a police officer because of the esteem in which the public holds law enforcement and the risk that a police officer would take by lying in court, are 'inappropriate.'"); United States v. Adams, 305 F.3d 30, 37 (1st Cir. 2002) (concluding that the prosecutor's statement "'[t]hey're not here looking for numbers' . . . could be viewed as a form of vouching for the competence and integrity of the police and probably should not have been said.")

** Note that in United States v. Auch, 187 F.3d 125, 132 (1st Cir. 1999), the First Circuit criticized a prosecutor for stating that if a government witness was lying to help the government "he would have concocted a [story] more damaging [to the defendant]," and announced that "prosecutors in this circuit should consider themselves well advised to strike such comments from their repertoires." Id.; accord United States v. Martínez-Medina, 279 F.3d 105, 119-20 (1st Cir. 2002). But the First Circuit later "disclaim[ed]" that dictum from Auch (which had been repeated in Martínez-Medina several years later). United States v. Pérez-Ruiz, 353 F.3d 1, 10 (1st Cir. 2003). The court explained that the Auch dictum was based on a misreading of earlier precedent and declared that "[t]hose statements are not good law." Id.; accord United States v. Vázquez-Rivera, 407 F.3d 476, 483-84 (1st Cir. 2005); see also United States v. Vázquez-Larrauri, 778 F.3d 276, 283 (1st Cir. 2015) ("Another proper credibility argument is that a witness would have told a better, more consistent story if the witness had been lying."); United States v. Wilkerson, 411 F.3d 1, 8 (1st Cir. 2005) (not improper vouching to say that if a witness was inclined to lie they would have made up a better story).

6. Comment either directly or indirectly on the defendant's refusal to testify. Griffin v. California, 380 U.S. 609, 613-615 (1965); see also United States v. Gorski, 880 F.3d 27, 38-39 (1st Cir. 2018) (prosecutor's argument that "at the end of the day [the defendant] can't face the music" and remark that "[h]e can't stand in front of you" might have improperly drawn the jury's attention to the defendant's decision not to testify and improperly shifted the burden of proof); United States v. Taylor, 848 F.3d 476, 490 (1st Cir. 2017) ("A prosecutor's comments about a gap in the evidence can violate a defendant's Fifth Amendment rights if, under the circumstances, it is obvious that only the defendant could have filled the gap."); United States v. Rodríguez, 215 F.3d 110, 122 (1st Cir. 2000) (improper to suggest defendant could have contradicted a government witness); United States v. Bey, 188 F.3d 1, 9 (1st Cir. 1999); United States v. Roberts, 119 F.3d 1006, 1014-15 (1st Cir. 1997); United States v. Lilly, 983 F.2d 300, 306-07 (1st Cir. 1992); United States v. Hodge-Balwing, 952 F.2d 607, 610 (1st Cir. 1991); United States v. Savarese, 649 F.2d 83, 86-87 (1st Cir. 1981);; United States v. Hooker, 541 F.2d 300, 307 (1st Cir. 1976) ("Persistent emphasis by the government on certain testimony being 'unimpeached' in circumstances where there is no one 'other than himself whom the defendant (could) call as a witness' might well create a situation where 'the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify'" (citations omitted)). But see United States v. Rodríguez-Vélez, 597 F.3d 32, 44

(1st Cir. 2010) ("[A]lthough it is not proper for a prosecutor to comment on a defendant's failure to testify, it is permissible (though dangerous) for a prosecutor to comment on the defense's failure to cross-examine a witness.").

7. "[I]nvite the jury to make any inference regarding the absence of a witness whose unavailability has arisen because of the invocation of his Fifth Amendment right against self-incrimination." United States v. Shoup, 476 F.3d 38, 44 (1st Cir. 2007) ("'[P]hantom' references [to such a witness] were extremely ill-advised").

8. Refer to the defendant's silence in the face of law enforcement personnel while in custody. United States v. Mooney, 315 F.3d 54, 61 n.1 (1st Cir. 2002) (acknowledging court's "dismay that any prosecutor in this circuit could apprise a jury in an opening statement that a defendant had chosen not to talk to the police. It is difficult to imagine a more fundamental error.")

With regard to pre-custodial silence, in United States v. Zarauskas, 814 F.3d 509, 515 (1st Cir. 2016), the First Circuit read the Supreme Court's plurality opinion in Salinas v. Texas, 570 U.S. 178 (2013), as "leav[ing] open the question of whether, in line with the Fifth Amendment, a prosecutor may comment on the defendant's pre-custodial silence." In Zarauskas, the court "assum[ed], without deciding, that prosecutorial comment on the defendant's pre-custodial silence violates the Fifth Amendment," Id. The First Circuit has not definitively ruled on the issue at the time of this writing.

9. Argue to the jury "that the defendant is obligated to present evidence of his innocence." United States v. Diaz-Diaz, 433 F.3d 128, 135 (1st Cir. 2005) (citing United States v. Roberts, 119 F.3d 1006, 1015 (1st Cir. 1997) (prosecutor's statement that defense counsel could have called a government agent as a witness was improper where defense counsel was arguing that "the government had failed to present all of the evidence needed to prove [the defendant] guilty beyond a reasonable doubt" and not that the agent's "testimony would have been harmful to [the government's] case.")); see also United States v. Diaz-Castro, 752 F.3d 101, 112 (1st Cir. 2014) (finding it improper for prosecutor to "suggest[] to the jury that the defense had to call any witnesses it felt were missing."); United States v. Jiménez-Torres, 435 F.3d 3, 12 (1st Cir. 2006) ("Like Diaz–Diaz, [defense] counsel's argument was not aimed at having the jury draw a negative inference against the government but rather to argue that the government failed to prove its case. It was therefore incorrect for the government and the court to state that [the defense] could have called the absent witnesses.").

10. State that a defendant is "running" or "hiding" when a defendant does not testify. United States v. Hardy, 37 F.3d 753, 757-58 (1st Cir. 1994).

11. Invite the jury to see if the defendant's lawyer can explain something in closing argument. United States v. Wihbey, 75 F.3d 761, 768-70 (1st Cir. 1996); United States v. Akinola, 985 F.2d 1105, 1111-12 (1st Cir. 1993); United States v. Skandier, 758 F.2d 43, 45-46 (1st Cir. 1985).

12. State that he or she "welcomes" the burden of proof. United States v. Smith, 982 F.2d 681, 685 (1st Cir. 1993) (calling the statement "overzealous"); United States v. Flaherty, 668 F.2d 566, 596-97 (1st Cir. 1981) (calling the statement "troublesome").

13. Offer an erroneous definition of the burden of proof. United States v. Gonzalez-Gonzalez, 136 F.3d 6, 8-9 (1st Cir. 1998) (agreeing with government's concession that prosecutor erred in telling jury that burden is met "[i]f in your mind you think . . . and in your heart, you feel" that the defendant is guilty).

14. Refer to facts not in evidence. United States v. Walker-Couvertier, 860 F.3d 1, 10-11 (1st Cir. 2017) ("[T]he government crossed the line into forbidden terrain when it cavalierly told the jury that 'boatloads' of other evidence, never introduced, inculpated the defendants."); United States v. Kinsella, 622 F.3d 75, 85 (1st Cir. 2010) ("[T]he prosecutor strayed into a forbidden zone by discussing something not in evidence."); United States v. Gentles, 619 F.3d 75, 81 (1st Cir. 2010) (impermissible to refer to confidential informants' willingness "to accept the risk" of testifying, when no evidence the defendant was violent or would retaliate; impermissible to refer to studies of CSI, when no such studies in evidence); United States v. D'Amico, 496 F.3d 95, 105 (1st Cir. 2007), vacated on other grounds, 128 S. Ct. 1239 (2008) (mentioning fact not in evidence was not "a minor mistake by the prosecutor; it created a real risk of infecting to a material degree what was otherwise proper argument."); United States v. Potter, 463 F.3d 9, 24 (1st Cir. 2006) ("[A] clear and deliberate reference in closing to supposedly favorable evidence that the government says it possesses but did not offer at trial is one of the worst sins a prosecutor can commit; and the effect may be just as bad even though the jury is left to guess at the content."); United States v. Auch, 187 F.3d 125, 129 (1st Cir. 1999) (finding improper the prosecutor's continued references to another crime where the judge had sustained objections to its admissibility); United States v. Roberts, 119 F.3d 1006, 1015-16 (1st Cir. 1997) (finding it improper to tell jury to ignore membership in motorcycle gang where there was no evidence of membership in motorcycle gang; improper, in responding to defense argument that a search would have revealed no incriminating evidence, to assert facts outside record and inaccurate law; proper response is to object to defendant's improper argument); United States v. de Leon Davis, 914 F.2d 340, 344-45 (1st Cir. 1990); United States v. Johnson, 893 F.2d 451, 454 (1st Cir. 1990).

15. Imply reliance on knowledge or evidence not available to the jury. United States v. Page, 521 F.3d 101, 107-08 (1st Cir. 2008) (government conceded that it was inadvisable for prosecutor to imply that a separate, unrelated criminal act had been committed where the necessary facts were not in evidence); United States v. Manning, 23 F.3d 570, 574 (1st Cir. 1994) (prosecutor "went too far" by implying that partial prints were inculpatory); see United States v. Smith, 982 F.2d 681, 684 n.3, 685 (1st Cir. 1993) (prosecutor's "overzealous statement that the prosecutor 'welcome[d]' the burden of proof," though concededly improper, did not constitute reversible error where "its context did not suggest that the prosecutor's confidence was founded on knowledge or evidence unavailable to the jury.").

16. "[T]ell the jury what witnesses who did not testify would have said had they testified." United States v. Lopez, 380 F.3d 538, 546-47 (1st Cir. 2004) (quoting United States v. Palmer, 37 F.3d 1080, 1087 (5th Cir. 1994)).

17. Exhort the jury to:

(a) "follow [their] oath . . . [and] find the defendant guilty . . . because it is the right thing to do." United States v. Grullon, 545 F.3d 93, 97 (1st Cir. 2008) ("[S]uch language . . . can [improperly] shift the emphasis from whether the evidence establishes guilt to other possible concerns (such as whether the defendant is a dangerous man whose jailing would be a good thing for the community).").

(b) "do justice to . . . the victim in this case." United States v. Quesada-Bonilla, 952 F.2d 597, 601-02 (1st Cir. 1991); accord United States v. De La Paz-Rentas, 613 F.3d 18, 26 (1st Cir. 2010) ("do justice" is "troubling" because it "can be used to convey the idea to the jury that their job is to convict").

(c) do "your duty as jurors" and find the defendant guilty. United States v. Andújar-Basco, 488 F.3d 549, 561 (1st Cir. 2007) (government conceded the remark was error; court noted it was troubled that "such improper arguments persist," id. at 561 n.5); see also United States v. Castro-Davis, 612 F.3d 53, 68 (1st Cir. 2010) (improper to say to jury: "And you hold them accountable for what they did. . . . You hold them accountable."); United States v. Kinsella, 622 F.3d 75, 85 (1st Cir. 2010) (prosecutors "*cannot* suggest that jurors have a civic duty to *convict*" (emphasis in original)); United States v. Ayala-García, 574 F.3d 5, 17 (1st Cir. 2009) (referring to "the prosecutor's admonition to the jury to 'do your job, find the Defendants guilty'" as "disturbing"); United States v. Mandelbaum, 803 F.2d 42, 44 (1st Cir. 1986) (finding improper the suggestion that a jury has "a duty to decide one way or the other" because such an appeal "can only distract a jury from its actual duty: impartiality").

18. Cast suspicion on the role of defense counsel in general. United States v. Bennett, 75 F.3d 40, 46 (1st Cir. 1996); United States v. Boldt, 929 F.2d 35, 40 (1st Cir. 1991).

19. Play upon the jury's emotional reaction to crimes that are not charged. United States v. De La Paz-Rentas, 613 F.3d 18, 25-27 (1st Cir. 2010) (improper for prosecutor to comment on "the treachery of a renegade police officer who betrays his oath to protect the public" when "the defendants were not on trial for dereliction of duty and[, therefore,] the prosecutor had no business inviting the jury to focus on this aspect of their wrongdoing"); United States v. Ayala-García, 574 F.3d 5, 17-19 (1st Cir. 2009) (where 31 bullets are found in an AK-47, improper to say that "31 lives were saved"; improper to say that defendant was "armed for a war that goes on every day in public housing projects"); United States v. Robinson, 473 F.3d 387, 397 (1st Cir. 2007) ("The closest the government came to impermissibly prejudicing the jury in its closing argument was when it concluded its rebuttal: 'I would suggest to you, ladies and gentlemen . . . that [Robinson is] guilty of possessing those guns in furtherance of that drug deal in which anything could have happened and probably something would have happened had it

been a real drug dealer and not a DEA undercover agent who was getting ripped off by the defendant.'" (but no "miscarriage of justice" in light of the jury instructions)); United States v. Procopio, 88 F.3d 21, 31 (1st Cir. 1996) (finding it improper to say "[o]ur society doesn't need it" concerning future criminal risk); United States v. Moreno, 991 F.2d 943, 947 (1st Cir. 1993) (finding it "patently improper" for government in firearm possession case to say that "the evidence will show that [the police officers] were doing their jobs protecting the community that has been plagued by violence, senseless violence, shootings and killings. That's why they were there and that's why we're here today.").

20. "[N]eedlessly arouse the emotions of the jury," or "interject issues having no bearing on the defendant's guilt or innocence," or "appeal to the jury to act in ways other than as dispassionate arbiters of the facts," United States v. Ayala-García, 574 F.3d 5, 16 (1st Cir. 2009), for example by:

(a) attempting to enlist jurors in the war on drugs. Arrieta-Agressot v. United States, 3 F.3d 525, 527 (1st Cir. 1993).

(b) commenting on the "fearsomeness" of a weapon. United States v. De La Paz-Rentas, 613 F.3d 18, 26 (1st Cir. 2010) ("[T]he fearsomeness of the weapon had nothing to do with [the defendant's] guilt or innocence and, by contrast, had some capacity to frighten the jury and to re-direct that fear as anger against the defendant.").

(c) brandishing a weapon before the jury. United States v. Santos-Rivera, 726 F.3d 17, 27 (1st Cir. 2013) (calling such conduct "prosecutorial misconduct" and "obviously inflammatory").

(d) tying the case to the prevalence of crime in the community at large. United States v. Avilés-Colón, 536 F.3d 1, 24-25 (1st Cir. 2008) (improper for prosecutor to state in opening that "[t]his case is about drugs and violence that we read about in the newspaper every day and we hear about on the television when we go home at night; the same violence which occurs in Puerto Rico on a daily basis and which takes the lives of hundreds of young people each year."); United States v. Moreno, 991 F.2d 943, 947 (1st Cir. 1993) (finding it "patently improper" and "outside the bounds of legitimate argument" to make remarks to the jury that " play[] upon the jury's emotional reaction to neighborhood violence").

(e) contrasting "the jurors' sense of community safety" with the crime charged. United States v. Mooney, 315 F.3d 54, 58-59 (1st Cir. 2002) (improper for prosecutor to state in opening that "[w]e are fortunate in the state of Maine . . . to live lives that are relatively free from random acts of violence. This case involves a painful exception to that rule . . . and in some respects has rocked the sense of security of an entire Maine community.").

(f) asking "the jurors to consider, when making their decision, whether they would want the defendant driving along the highway beside them," which "raised the specter of a threat to public safety—and the jurors' own personal security—if the jury

voted to acquit." United States v. Torres-Colón, 790 F.3d 26, 34 (1st Cir. 2015) (but here harmless error).

21. Make comments "of the species . . . that may inflame the jury's passion," for example: (1) addressing the issue of drug trafficking as "social malaise" and (2) "introduc[ing] an element of social standing into the closing—that defendant was more guilty than the others because he had had the opportunity to do something with his life, but instead chose drug trafficking." United States v. Vázquez-Rivera, 407 F.3d 476, 485-86 (1st Cir. 2005) ("We cannot say, however, that '[t]hese comments interjected issues having no bearing on the defendant's guilt or innocence and improperly appealed to the jury to act in ways other than as dispassionate arbiters of the facts.'" (quoting United States v. Mooney, 315 F.3d 54, 59 (1st Cir. 2002)).

22. Predict the consequences of the jury's verdict, United States v. Whiting, 28 F.3d 1296, 1302 (1st Cir. 1994) (citing ABA Standards Relating to the Administration of Criminal Justice 3-5.8(d)), or place upon the jury responsibility for extra-judicial consequences of the verdict, United States v. Auch, 187 F.3d 125, 132-33 (1st Cir. 1999) (finding "particularly troubling" the prosecutor's argument in closing that a not guilty verdict in an armed bank robbery case would be the "biggest day of [the defendant's] life and that he would laugh all the way to the bank").

23. Focus on the source of the defendant's arguments, rather than their merits. United States v. Whiting, 28 F.3d 1296, 1302-03 (1st Cir. 1994) (finding improper prosecutor's comment that defendant's "very able" lawyers had "floated" "smoke screens").

24. Conjure up images of religion that would appeal to jurors to abandon their dispassionate role. United States v. Cartagena-Carrasquillo, 70 F.3d 706, 713 (1st Cir. 1995) ("Injection of religion into the case was flatly wrong and contrary to what the public has a right to expect of government prosecutors."); United States v. Levy-Cordero, 67 F.3d 1002, 1008 (1st Cir. 1995) (improper to "conjur[e] up images of religion" by using hymn in closing argument).

25. Comment on Rule 404(b) evidence to urge jurors to draw the inference that Rule 404(a) forbids: that the defendant is "of bad character." United States v. Procopio, 88 F.3d 21, 31 (1st Cir. 1996) (prosecutor's statement that the defendants "share[d] a violent and vicious criminality" "encouraged the jury to conclude from the . . . evidence that the defendants were 'violent and vicious' criminals. This inference—that the defendants were of bad character—was precisely the inference that Rule 404(a) forbids.").

26. Appeal to the jurors' "hearts and minds" and "conscience." United States v. Martinez-Medina, 279 F.3d 105, 118-19 (1st Cir. 2002) ("The prosecutor told the jury that 'your conscience must have been screaming at you, screaming at you that [the defendants] were guilty.' Later, the prosecutor said that 'if you know in your head and your heart that these defendants are guilty then you must return the only verdict that the

evidence commands.' These comments were plainly improper appeals to the jury's emotions and role as the conscience of the community.").

27. Refer to defendants as "animals." United States v. Martinez-Medina, 279 F.3d 105, 119 (1st Cir. 2002) (calling comment "especially inflammatory and improper").

28. Say that "a plea of not guilty is 'not a declaration of innocence' but simply means 'government, prove your case.'" United States v. Soto-Beníquez, 356 F.3d 1, 42 (1st Cir. 2003).

29. Tell the jury that the government provided expert testimony "[a]t considerable expense." United States v. Landry, 631 F.3d 597, 605-06 (1st Cir. 2011) ("[S]tatements regarding the time and expense in procuring these expert witnesses were plainly irrelevant").

30. "[P]ropound inferences that [the prosecutor] knows to be false, or has a very strong reason to doubt." United States v. Kasenge, 660 F.3d 537, 542 (1st Cir. 2011), characterizing the holding in United States v. Udechukwu, 11 F.3d 1101, 1106 (1st Cir. 1993).

31. "Coach[ ] witnesses through, say, head-nodding and eye movements." It "is different than vouching—but using gestures for that purpose is equally improper." United States v. Sepúlveda-Hernández, 752 F.3d 22, 31 (1st Cir. 2014).

32. Correct an interpreter's translation. United States v. Báez-Martínez, 786 F.3d 121, 125 (1st Cir.), cert. granted, judgment vacated on other grounds, 136 S. Ct. 545 (2015) ("[T]he prosecutor's spontaneous correction of the interpreter may well have constituted error. ").

33. "[Urge] the jury to convict [the defendant] on the basis of [a non-testifying co-defendant's] confession, a line of argument that Bruton and its progeny plainly prohibit." United States v. Martinez, 640 F. App'x 18, 29 (1st Cir. 2016) (citing Bruton v. United States, 391 U.S. 123 (1968)).

34. Mischaracterize the law on an affirmative defense, United States v. Amaro-Santiago, 824 F.3d 154, 159 (1st Cir. 2016) ("problematic" and "troubling" but not warranting reversal because of specific and thorough curative instruction).

35. Analogize a criminal conspiracy to a train, which people get onto and off of, if the analogy fails to convey that a criminal defendant may withdraw from the conspiracy in either of two ways: (1) by making a full confession to authorities, or (2) by communicating to his co-conspirators that he has abandoned the enterprise and its goals. United States v. Belanger, 890 F.3d 13, 34-35 (1st Cir. 2018) ("The Government's closing was far from model and we discourage any further use of it.").

B. A PROSECUTOR MAY:

1. Respond to a defendant's attacks on the credibility of a cooperating witness. United States v. Martin, 815 F.2d 818, 821-23 (1st Cir. 1987).

2. Comment on the credibility of witnesses and ask the jury to draw inferences about credibility during closing argument. United States v. French, 904 F.3d 111, 124-25 (1st Cir. 2018) (noting that "commenting on the credibility of witnesses is usually appropriate in a closing argument" where prosecutor suggested that the defendants' testimony "was not credible given their motivations and the other evidence" and also "describe[ed] various witnesses as 'liars' and 'scoundrels.'"); United States v. Santana-Pérez, 619 F.3d 117, 123 (1st Cir. 2010) (permissible to say "'[t]here's matters of credibility in this case,' and rhetorically ask[ ] which version of the events the jury would choose to believe"); United States v. Kasenge, 660 F.3d 537, 542 (1st Cir. 2011) (permissible to ask "that the jury draw inferences of credibility").

3. Comment on the quality of a defendant's alibi and witnesses, United States v. Glantz, 810 F.2d 316, 320-24 (1st Cir. 1987) (citing United States v. Savarese, 649 F.2d 83, 87(1st Cir. 1981)).

4. Comment on the plausibility of the defense theory. United States v. Padilla-Galarza, 886 F.3d 1, 12 (1st Cir. 2018); United States v. Berroa, 856 F.3d 141, 162 (1st Cir. 2017) (prosecutor was "entitled to respond by contesting the plausibility of that defense theory."); United States v. Glover, 558 F.3d 71, 78 (1st Cir. 2009) ("When commenting on the plausibility of a defense theory, the government's focus must be on the evidence itself and what the evidence shows or does not show, rather than on the defendant and what he or she has shown or failed to show."); United States v. Henderson, 320 F.3d 92, 106 (1st Cir. 2003); United States v. Smith, 982 F.2d 681, 683 (1st Cir. 1993) ("Although the phrasing of the prosecutor's argument left something to be desired, it was not improper to urge the jury to evaluate the plausibility of the justification defense in light of the other evidence (and the lack thereof), as well as the motivations and biases of the defense witnesses, including appellant.").

5. "[Identify] for the jury a specific item of evidence and [argue] that the jury should infer from that piece of evidence that the defendant's theory was not worthy of belief." United States v. Henderson, 320 F.3d 92, 105 (1st Cir. 2003) (prosecutor characterized defendant's claims as "absurd").

6. Comment on gaps in the defendant's evidence under the defendant's theory of the case, or say that the defendant's story is implausible, or focus on defects in the defense's cross-examination of a witness, so long as the prosecutor does not thereby impermissibly comment on the defendant's failure to testify. United States v. Glover, 558 F.3d 71, 78 (1st Cir. 2009); accord United States v. Salley, 651 F.3d 159, 165 (1st Cir. 2011); see also United States v. Wilkerson, 411 F.3d 1, 8-9 (1st Cir. 2005) (not plain error to say "there's no real evidence" or "pretty much nothing" to support the defendant's theory of the case); United States v. Balsam, 203 F.3d 72, 87-88 (1st Cir. 2000) (expressing concern, but finding no reversible error where arguments "expressly focused

only on defects in the cross-examination of [a witness] by the defense, without inevitably implying that [defendant] should have taken the stand"); United States v. Roberts, 119 F.3d 1006, 1011, 1015-16 (1st Cir. 1997) (finding it reversible error to argue that when defendant does "go forward" to offer evidence, "the defendant has the same responsibility [as the government] and that is to present a compelling case"); United States v. Lewis, 40 F.3d 1325, 1337-38 (1st Cir. 1994); United States v. Donlon, 909 F.2d 650, 656-57 (1st Cir. 1990), *abrogated on other grounds by* United States v. Salerno, 505 U.S. 317 (1992); United States v. Garcia, 818 F.2d 136, 143-44 (1st Cir. 1987); United States v. Glantz, 810 F.2d 316, 320-24 (1st Cir. 1987).

7. Indirectly refer to a defendant's opportunity to testify, but only where it is a fair response to a claim made by defense counsel. United States v. Rouleau, 894 F.2d 13, 16 (1st Cir. 1990) (citing United States v. Robinson, 485 U.S. 25, 33-34 (1988)); see also United States v. Ayewoh, 627 F.3d 914, 924-26 (1st Cir. 2010) (where defendant's theory of the case as presented by witness and lawyer was that "friend of a friend" was responsible, but defendant did not testify, prosecutor could say in closing: "We still don't know who this friend of a friend is," "We have no name," and "[Y]ou haven't heard evidence of [the defendant calling the friend]," as a "fair response" under Robinson).

8. Inform the jury of the contents of a witness's plea agreement, including its requirement that the witness tell the truth (where the plea agreement has been admitted into evidence), discuss the details of the plea during closing and comment upon a witness's incentive to testify truthfully. United States v. Hansen, 434 F.3d 92, 101-02 (1st Cir. 2006); United States v. Bey, 188 F.3d 1, 7-8 (1st Cir. 1999); United States v. Dockray, 943 F.2d 152, 156 (1st Cir. 1991).

9. Assert reasons (that are in evidence) why a witness ought to be accepted as truthful. United States v. Rodríguez, 215 F.3d 110, 123 (1st Cir. 2000) ("[A]n argument that does no more than assert reasons why a witness ought to be accepted as truthful by the jury is not improper witness vouching."); see also United States v. Walker-Couvertier, 860 F.3d 1, 11-12 (1st Cir. 2017) ("[T]he prosecutor did not mention his personal beliefs about the witnesses' veracity, nor did he imply that the witnesses should be trusted simply because they testified on the government's behalf. Instead he referred to trial testimony in an effort to give the jurors a reason why they should credit the witnesses' testimony."); United States v. Castro-Davis, 612 F.3d 53, 68 (1st Cir. 2010) (permissible to say "'not a single shred of evidence' and 'not a single reason' that [a witness] would lie," and "that defendants did not attempt to cross-examine [the witness]"); United States v. Page, 521 F.3d 101, 107 (1st Cir. 2008) (permissible to refer to particular facts in the record that "may have provided [a] witness with an incentive to testify truthfully," such as that the witness's testimony implicated a close relative in criminal conduct); United States v. Avilés-Colón, 536 F.3d 1, 25 (1st Cir. 2008) (permissible to say in opening that the government was "fortunate enough to be able to present" the testimony of a former gang member and that the defendant's "criminal history did not 'take away from his credibility'" because "[t]he challenged statements simply refer to the basis for the witness's knowledge"); United States v. Avilés-Colón, 536 F.3d 1, 25 (1st Cir. 2008); United States v. Vázquez-Rivera, 407 F.3d 476, 483-84 (1st Cir. 2005) (permissible to refer to safety valve reduction as evidence of truthfulness where witness's veracity

attacked) (semble); United States v. Henderson, 320 F.3d 92, 106 (1st Cir. 2003) (permissible to say that the witness "repeatedly told you that she was told to tell the truth, to tell the truth when she took the stand"); United States v. Figueroa-Encarnacion, 343 F.3d 23, 28-29 (1st Cir. 2003); United States v. Auch, 187 F.3d 125, 131 (1st Cir. 1999) ("To the extent that the prosecutor's arguments referred to [the witness's] motives to tell the truth, the argument falls within the accepted bounds and was entirely proper."); United States v. Dockray, 943 F.2d 152, 156 (1st Cir. 1991) (not "improper for the government to call attention to a witness' motivation for testifying.").

The First Circuit recently summarized what is permissible:

> It is generally permissible for the government to offer specific "reasons why a witness ought to be accepted as truthful by the jury." United States v. Rodríguez, 215 F.3d 110, 123 (1st Cir. 2000) (not improper for prosecutor to argue that cooperating witness was credible because his testimony put him and his family in danger). One such reason is that the witness testified pursuant to a plea agreement that required the witness to testify truthfully to receive the benefit of the bargain. See, e.g., United States v. Hansen, 434 F.3d 92, 101-02 (1st Cir. 2006) (not improper for prosecutor to remind jury that witness testified that he agreed to tell the truth in a plea agreement); United States v. Henderson, 320 F.3d 92, 106 (1st Cir. 2003) (same). Another proper credibility argument is that a witness would have told a better, more consistent story if the witness had been lying, see, e.g., Pérez-Ruiz, 353 9-10 ("If they were all going to get up and make up a story, wouldn't it have been a better story?"), at least as long as the argument does not assert that the lack of consistency was viewed as a sign of credibility by the government itself, see Vizcarrondo-Casanova, 763 F.3d at 96 (possibly error, but not clear or obvious error, when prosecutor's statement that "the Government knew that the [witnesses'] versions were going to conflict" could have been understood as "a suggestion that the government itself concluded that the stories were credible.").

United States v. Vázquez-Larrauri, 778 F.3d 276, 283 (1st Cir. 2015).

10. Ask the jury to "use common sense and place themselves in the witness' shoes to evaluate his testimony." United States v. Kornegay, 410 F.3d 89, 97 n.6 (1st Cir. 2005). "Inherent in such a common sense evaluation is that each juror will place him or herself in the witness' position to judge the witness' motivations based on the juror's notion of typical human behavior." Id.; see also United States v. Pérez-Ruiz, 353 F.3d 1, 10 (1st Cir. 2003) (permissible to "merely ask[] the members of the jury to use their common sense in evaluating the witnesses' testimony").

11. Pose hypothetical questions that ask the jurors "to use common sense judgment," in response to an entrapment defense. United States v. Matías, 707 F.3d 1, 6 (1st Cir. 2013) (prosecutor asked jury during closing: "1) '[W]hen you consider predisposition, if somebody—tomorrow morning you wake up—drops 22 kilograms of

cocaine on your front doorstep, would you have any idea how to distribute it?'; and 2) 'Have you ever wrapped money in dryer sheets?'").

12. Ask the jury to draw reasonable inferences from the evidence and suggest which inferences should be drawn. United States v. Pires, 642 F.3d 1, 14-15 (1st Cir. 2011) ("It is eminently proper for a prosecutor—like any other lawyer—to attempt to persuade the jury to draw reasonable inferences favorable to her case."); see also United States v. Peña-Santo, 809 F.3d 686, 702 (1st Cir. 2015) (finding no error where prosecutor referred to the amount of drugs and asked the jury to infer that they were not for personal use); United States v. Liriano, 761 F.3d 131, 139 (1st Cir. 2014) (permissible for prosecutor to ask the jury to infer that "candy" was a code word for drugs where the prosecutor did not state that there was evidence proving the meaning of the term); United States v. Jones, 674 F.3d 88, 93 (1st Cir. 2012) (statements by prosecutor "simply asked the jury to draw reasonable inferences from evidence presented at trial and their own experiences, which is entirely permissible."); United States v. Brandao, 539 F.3d 44, 63 (1st Cir. 2008); United States v. Henderson, 320 F.3d 92, 106 (1st Cir. 2003) (nothing improper about saying "if you ask the wrong questions, you get the wrong answers" and "if you ask the right questions in this case, there's no doubt but that [the defendants] will be convicted"); United States v. Hamie, 165 F.3d 80, 84 (1st Cir. 1999) ("This is a narrow path to tread, with some comments being impermissible because they rely on too big an inferential leap, and others being within permissible limits. . . . [P]rosecutors should be wary of crossing that boundary. . . ." (citations omitted)); United States v. Cunan, 152 F.3d 29, 35 (1st Cir. 1998); United States v. Smith, 982 F.2d 681, 683-84 (1st Cir. 1993); United States v. Ocampo-Guarin, 968 F.2d 1406, 1411-12 (1st Cir. 1992); United States v. Abreu, 952 F.2d 1458, 1471 (1st Cir. 1992); United States v. Mount, 896 F.2d 612, 626 (1st Cir. 1990) ("[T]here is nothing improper in the Government's suggesting which inferences should be drawn."); United States v. Cotter, 425 F.2d 450, 453 (1st Cir. 1970) (prosecutor may suggest inferences based on the record itself, but may not suggest that he has "certain other, undisclosed facts at his disposal" and may not express a personal opinion).

13. Argue that circumstantial evidence is not susceptible to any interpretation other than that offered by the government, so long as the prosecutor's comments are directed solely at the evidence and not at the defendant's failure to testify. United States v. Akinola, 985 F.2d 1105, 1111-12 (1st Cir. 1993).

14. If the defendant testifies,

(a) attack the evidentiary foundation upon which the testimony rests. United States v. Brennan, 994 F.2d 918, 926 (1st Cir. 1993) (citing United States v. Garcia, 818 F.2d 136, 143-44 (1st Cir. 1987) and United States v. Savarese, 649 F.2d 83, 87 (1st Cir. 1981)).

(b) call the jury's attention to the fact that the defendant had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly. Portuondo v. Agard, 529 U.S. 61, 73 (2000).

(c) "comment on the implausibility of her testimony or its lack of an evidentiary foundation" or "impugn[ ] the defendant's credibility by commenting on her failure to produce any corroborating evidence." United States v. Boulerice, 325 F.3d 75, 86, 87 (1st Cir. 2003); United States v. Matías, 707 F.3d 1, 5 (1st Cir. 2013) (calling the defendant's version "'an incredible story . . . it's a clever story, but it's just that, a story, because it doesn't add up' and subsequently arguing that [the defendant] was trying to deceive the jury" was permissible because the defendant put his credibility at issue by testifying).

(d) comment on the defendant's interest in the case, as it bears upon credibility. United States v. Vázquez-Rivera, 407 F.3d 476, 486 (1st Cir. 2005).

15. Comment on the defendant's decision to remain silent in a context outside the legal process, such as during the commission of the crime (but *not* on the defendant's decision to remain silent at trial or in the face of law enforcement personnel, as such a comment would "transgress the Fifth Amendment."). United States v. Taylor, 54 F.3d 967, 979 (1st Cir. 1995).

16. Comment on what a defendant said in a pre-custodial interview and argue that he was "spin[ning] a web of inconsistent statements." United States v. Zarauskas, 814 F.3d 509, 518 (1st Cir. 2016) (contrasting the prosecutor's statement with a comment about the defendant's choice to remain silent, which the court had assumed, without deciding, would violate the defendant's Fifth Amendment rights).

17. Describe accurately any testimony that the jury will hear (opening) or already has heard (closing). United States v. Espinal-Almeida, 699 F.3d 588, 606 (1st Cir. 2012) (not improper vouching to state in opening that a law enforcement officer sitting in the courtroom would testify as to certain events where prosecutor did not imply or suggest that the jury should "credit or elevate" his testimony "just because he was a government agent"); United States v. Gentles, 619 F.3d 75, 84 (1st Cir. 2010) (permissible to state in closing that confidential informants were working for DEA at time of certain transactions when it was made clear during government's direct case); United States v. McKeeve, 131 F.3d 1, 14 (1st Cir. 1997).

18. Explain to the jury during closing that a witness whose testimony was promised in the opening did not testify because other admitted evidence provided the information, but the prosecutor must not tell the jury the substance of what the missing witness would have said if the witness had testified. United States v. Lopez, 380 F.3d 538, 546-47 (1st Cir. 2004).

19. Refer to the defendant's choice of friends to explain why the government would rely on witnesses with criminal records. United States v. Auch, 187 F.3d 125, 129 n.5 (1st Cir. 1999).

20. Say that there is "no real question" on specific issues where, in context, the statement is drawing the jury's attention to what the evidence has shown and not the defendant's decision not to testify. United States v. Bey, 188 F.3d 1, 8-9 (1st Cir. 1999).

21. Respond to defense counsel's criticism of the government's failure to have an informant testify by stating that defendant could have called the informant (if true). United States v. Adams, 305 F.3d 30, 38 (1st Cir. 2002). The same is true for production of documents. United States v. Mangual-Garcia, 505 F.3d 1, 12-13 (1st Cir. 2007). On the other hand, if such a comment by the prosecutor was unprovoked, it "could amount to impermissible burden shifting." United States v. Adams, 305 F.3d 30, 38 (1st Cir. 2002).

22. Make a remark that was "invited" by the defense and "did no more than respond substantially in order to right the scale" (known as the "invited response rule"). United States v. Henderson, 320 F.3d 92, 107-08 (1st Cir. 2003) (where defense counsel suggested in opening that defendant "was a legitimate businessman," it was permissible for the prosecutor to respond in closing that the defendant was "a successful businessman in the business of crack cocaine"); see also United States v. González-Pérez, 778 F.3d 3, 19-20 (1st Cir. 2015) (finding prosecutor's rhetorical question about "how many times the government doesn't have evidence like you saw in this case" permissible because "defense counsel invited the prosecutor's comparison to other cases"); United States v. Matías, 707 F.3d 1, 6 (1st Cir. 2013) (where defense was that the defendant had feigned interest in a drug deal because of his concern for another's family, it was permissible for the prosecutor to say that the defendant had portrayed himself as a family man "who pumps tons and tons of marijuana into the community and a few kilograms of cocaine" and then ask the jury, "Is that a family man?"); United States v. Jones, 674 F.3d 88, 93 (1st Cir. 2012) (where defense counsel argued in closing that the government's witnesses were inherently unreliable, permissible for the prosecutor to respond: "The defendant chose the witnesses in this case, not the Government"; where defense counsel argued that the prosecution presented no hard evidence, permissible for the prosecutor to respond: "This is a drug case; there are no drugs. We don't need drugs; we need evidence."); United States v. Wilkerson, 411 F.3d 1, 8 (1st Cir. 2005) (not plain error for prosecutor to argue "that if the jury found that [the defendant] ran up the driveway, they would necessarily have to find that the [police] officers did not tell the truth, because the officers testified that he ran up the alley" because it was a "logical response to [the defendant's] theory of the case . . . .").

23. Respond to provocative statements by defense counsel in rebuttal (as compared with what a prosecutor may say in the original closing argument). United States v. Skerret-Ortega, 529 F.3d 33, 39-40 (1st Cir. 2008); accord United States v. Ayala-García, 574 F.3d 5, 17-19 (1st Cir. 2009) (same, but warning "that 'there are limits to the extent that we will permit fighting fire with fire.'" (quoting United States v. Sepúlveda, 15 F.3d 1161, 1189 n.24 (1st Cir. 1993))); see also United States v. Gentles, 619 F.3d 75, 84-85 (1st Cir. 2010) (where defense counsel argued that testifying confidential informants "were getting a 'complete pass' for their own wrongdoing, gave testimony that was 'bought and paid for by the Government,' and were 'in bed' with the Government," permissible for prosecutor to respond by characterizing "providing information on a drug dealer" as "public service that they are getting paid for"); United States v. Vázquez-Botet, 532 F.3d 37, 59 (1st Cir. 2008) (where defense counsel argued in closing that if prosecutor had called defendant's secretary to testify she would have corroborated defense version of the facts, permissible for prosecutor to argue in rebuttal that although

defendants had no duty to put on testimony, defendants "would have subpoenaed a given witness had they believed her testimony would exculpate them" because remark was "a limited, proportionate, and thus closely tailored, response to [defense counsel's] rather outrageous invitation").

Another example is United States v. Skerret-Ortega, 529 F.3d 33 (1st Cir. 2008), where defense counsel said the following during closing argument:

> You are going to live with your decision the rest of your life . . . . Are you really going to rest the rest of your lives with the decision you are about to make on a criminal? On a woman that cannot remember the dates?

Id. at 39-40. The First Circuit concluded that the government could permissibly respond by referring to an "innocent victim, living in one of our housing projects and having to endure the trafficking by these individuals" and by stating the following in rebuttal:

> [W]hen you decide this matter as judges, remember that you will live with the decision of course. You will live with the honest decision that you put a criminal behind bars. Not just left out in the street, another criminal to continue selling drugs next to the kids because you saw they sold regardless of the kids, not even caring for any of those kids, one of them was even giving money to a little child to take God knows where. So when you live with your conscience you will live with your knowledge as judges of the fact you did justice. . . .

Id.

24. Ask witnesses what they told "us" or "the agents" in proffer sessions when used in context to differentiate among witnesses, and not to "bolster the government's credibility with those references." United States v. Barbour, 393 F.3d 82, 90 (1st Cir. 2004).

25. Use the word "we" during closing argument, when it is plausible based on the record "that the prosecutor used 'we' to rehash the evidence heard at trial, not to throw the weight of the prosecutor's office behind the evidence to establish credibility." United States v. Ponzo, 853 F.3d 558, 584 (1st Cir. 2017).

26. Call a defense theory a "red herring," United States v. Wilkerson, 411 F.3d 1, 9 (1st Cir. 2005), or describe the defense "as a 'self-serving absurdity,'" United States v. Sanchez-Berrios, 424 F.3d 65, 73 (1st Cir. 2005) (calling the prosecution's description of the defense "not flattering," but "fair argument").

27. Say that law enforcement testimony "has the ring of truth." United States v. Isler, 429 F.3d 19, 28 (1st Cir. 2005) (reasoning that this does not constitute improper vouching because (1) arguing why a witness should be believed is not vouching; (2) prosecutor did not express personal views or imply that officers should be believed because they were government officials; and (3) comments were a logical counter to

defense claim of witness fabrication); see also United States v. Gomes, 642 F.3d 43, 46 (1st Cir. 2011) (not vouching to ask a witness what basis he had for questioning a detective's testimony).

28. Say that a witness "comes into court and tells you under oath." United States v. Castro-Davis, 612 F.3d 53, 66 (1st Cir. 2010).

29. Qualify an objection to the defense lawyer's opening statement with the words "unless the defendant is going to testify" when the defense lawyer appears to be describing evidence that only the defendant would have. United States v. Rivera-Hernández, 497 F.3d 71, 78–79 (1st Cir. 2007) ("the comment was 'at most a glancing brush rather than a blow against the privilege'" (quoting United States v. Procopio, 88 F.3d 21, 30 (1st Cir. 1996))).

30. Make a statement that, while "not literally true in the abstract," will be understood by the jury more narrowly "in context." United States v. Brandao, 539 F.3d 44, 64 (1st Cir. 2008).

31. Ask the jury to consider "'what might have happened' if the police had not intervened" if the statement is made in the context of inferring motive where motive is circumstantial evidence of an element of the case. United States v. Meadows, 571 F.3d 131, 145 (1st Cir. 2009).

32. Argue to the jury that the defense could not rebut certain evidence where the prosecutor made no reference to the defendant's failure to testify, United States v. Niemi, 579 F.3d 123, 128-29 (1st Cir. 2009), and "draw the jury's attention to the balance of evidence on contested issues," as long as there is no reference to the defendant's remaining silent in the courtroom, United States v. Stroman, 500 F.3d 61, 65 (1st Cir. 2007); accord United States v. Báez-Martínez, 786 F.3d 121, 127-28 (1st Cir.), cert. granted, judgment vacated on other grounds, 136 S. Ct. 545 (2015) (prosecutor's comments that certain testimony was "uncontested" were not "deliberate references to the defendant's silence. Nor [wa]s there any reason to believe that the jury would have treated them as such.").

33. Refer to defendant charged with robbery as a "robber" during closing arguments because the name is intrinsic to the crime charged. United States v. Montiero, 871 F.3d 99, 111 n.4 (1st Cir. 2017).

34. Argue to the jury in a felon-in-possession case, even where drug crimes were not charged, that:

> [I]n this case, there's only one reasonable inference, and that's that [the defendant] . . . took possession and control of that gun and put it under the bed. And because of the government's evidence in this case, you know why he did it. The reason that he did that is that he is a drug dealer. . . . It is

> not in any way hard to understand why a drug dealer would want a gun in his room.

United States. v. Torres-Rosario, 658 F.3d 110, 113 (1st Cir. 2011). The court reasoned that "the government was free to invite the jury to infer that [the defendant] dealt in drugs, furnishing a motive for him also to possess a gun to protect them." Id. at 114.

35. "[M]ention the foreign origins of a conspiracy when there is evidence to support the statement." United States v. Lopez Garcia, 672 F.3d 58, 64 (1st Cir. 2012) (citing United States v. Ovalle-Marquez, 36 F.3d 212, 220 (1st Cir. 1994)). For example, in Lopez Garcia, the prosecutor referred to "the 'Mexican' connection of the conspiracy" during closing argument and the First Circuit stated, "[t]he mention of Mexico was not error *per se*, for the prosecutor was entitled to point out that the drugs used in the alleged conspiracy were, in fact, from Mexico, given the evidentiary basis for saying so." 672 F.3d at 64. The court concluded that the comment was not likely to inflame or prejudice the jury because "generally informed jurors" would likely already know "that high level drug trade is typically violent and that a lot of drugs come north from Mexico." Id.

36. Refer to a drug conspiracy defendant as a "drug dealer" multiple times, where the court explicitly instructed the jury that opening and closing arguments are not evidence and that only the jury was to judge the case. United States v. Spencer, 873 F.3d 1, 2, 15 (1st Cir. 2017).

37. Refer to a house where contraband was found as defendant's "residence," despite the existence of a factual dispute as to that point, where (1) the prosecutor cautioned the jury that what he or she was about to say was not evidence, and (2) the government introduced substantial evidence in support of the characterization. United States v. Padilla-Galarza, 886 F.3d 1, 12-14 (1st Cir. 2018).

38. Describe a defendant's actions as "war," where testimony used that term, and use the phrase "killed like dogs." United States v. Candelario-Santana, 834 F.3d 8, 26 (1st Cir. 2016) (latter phrase "may be distasteful but . . . hardly plain error.").

39. Describe the defendant as "acting as the bagman dropping off bags of cash" where the evidence showed that the defendant brought the cash in a Ziploc bag more than once. United States v. Russell, 728 F.3d 23, 40 (1st Cir. 2013), vacated on other grounds, 134 S. Ct. 1872 (2014).

40. State the government's theory of the case in its closing. United States v. Carpenter, 736 F.3d 619, 627 (1st Cir. 2013) (but, the court noted, "the government may not make unfair statements").

41. Talk about "the importance of the case" during closing. United States v. Kinsella, 622 F.3d 75, 84-85 (1st Cir. 2010) (quoting United States v. Cotter, 425 F.2d 450, 452 (1st Cir. 1970)).

42. State that "every witness that came and testified before you was a witness against the [d]efendant" in response to a defense closing that "focused on the government's three main witnesses . . . and what those witnesses had to gain by testifying." United States v. Vázquez-Larrauri, 778 F.3d 276, 285-86 (1st Cir. 2015) (concluding that statement did not amount to a comment on the defendant's failure to testify).

43. Remark in rebuttal "that it was 'time for [the defendant] to be held accountable by you,'" in response to defense counsel's argument "shifting blame to [others]." United States v. Foley, 783 F.3d 7, 22 (1st Cir. 2015).

44. State that certain "facts are not in dispute because the defendant admitted to them." United States v. Gemma, 818 F.3d 23, 37 (1st Cir. 2016) ("The comments merely highlighted the defendant's own admissions, and the government tied the evidence that it said was undisputed to admissions that [the defendant] made. No reasonable jury would have understood these remarks as a comment on the defendant's failure to testify.").

45. "[P]oint out to the jury that defense counsel had not made certain arguments" where, "[t]aken in context, no reasonable juror could interpret the prosecutor's statements as even veiled commentary on [the defendant's] decision not to testify." United States v. Walker-Couvertier, 860 F.3d 1, 12 (1st Cir. 2017).

C. PROBLEMATIC STATEMENTS FOR A PROSECUTOR:

1. Say of witnesses, "they were 'the *only* people who laid it out for you'" because the statement could be interpreted as impermissibly commenting on a defendant's failure to testify or call witnesses. United States v. Barbour, 393 F.3d 82, 90 (1st Cir. 2004) (emphasis in original).

2. "Specifically refer[ ] to defense counsel's failure to address aspects of the prosecution's case." United States v. Berroa, 856 F.3d 141, 162 (1st Cir. 2017) (stating that it was "at least arguable . . . that the prosecutor exceeded the bounds of propriety" by doing so).

3. Comment on the defense's failure to cross-examine a witness. United States v. Rodríguez-Vélez, 597 F.3d 32, 44 (1st Cir. 2010) ("[I]t is permissible (though dangerous) for a prosecutor to comment on the defense's failure to cross-examine a witness.").

4. Say of an audio recording, "this allowed you to listen to this defendant," because the statement could be interpreted as a reminder to the jury that the defendant did not testify. United States v. Barbour, 393 F.3d 82, 90-91 (1st Cir. 2004); United States v. Panico, 435 F.3d 47, 50 (1st Cir. 2006) (referring to the defendant as a "witness" because of his tape-recorded utterances was "a rhetorical device, possibly ill-chosen").

5. Say that a witness "didn't stretch the truth here." The statement "comes close[] to the line of imparting [the prosecutor's] personal belief in the witness's veracity," but was not plain error. United States v. Wilkerson, 411 F.3d 1, 8 (1st Cir. 2005).

6. Say that the government's evidence is "not contradicted." United States v. Stroman, 500 F.3d 61, 64–66 (1st Cir. 2007) ("a risk," but finding the tactic legitimate under the circumstances). Stroman reaffirmed the test of United States v. Lilly, 983 F.2d 300, 307 (1st Cir. 1992), which asks "whether, in the circumstances of the particular case, the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Previously, the First Circuit seemed to prohibit such terms ("uncontradicted" or "unrefuted") outright. See United States v. Skandier, 758 F.2d 43, 44-45 (1st Cir. 1985).

7. Say that "'[t]here's been no suggestion that [the defendant] didn't know'" an element of the offense because, although the statement does not shift the burden of proof, it could ("debatably") be viewed as a comment on the defendant's failure to testify. United States v. Salley, 651 F.3d 159, 165-67 (1st Cir. 2011) (but not clear error where no objection at the time, no suggestion the prosecutor intended to comment on the failure to testify, and harmless in light of "tremendous" evidence of guilt).

8. Entreat the jury to "speak the truth" and convict the defendant, because it "might seem close to . . . cases where courts found improper exhortations to the jury 'to do its duty' and find the defendant guilty." United States v. Jones, 674 F.3d 88, 93 (1st Cir. 2012). The First Circuit did not reverse and said that while it was "not endorsing the flourish used here," it is proper to ask the jury "to deliver an honest verdict." Id.

9. Use himself/herself as an exemplar. United States v. Rodriguez, 675 F.3d 48, 65 & n.19 (1st Cir. 2012) (remarking that the prosecutor using himself as an exemplar "to illustrate his point [about credibility] by suggesting that whether the jurors trusted a person [to watch their children] had nothing to do with that person's credibility and everything to do with how well the jurors knew the person" is "[a] practice which we discourage.").

10. Describe a defense as "insulting." United States v. Matías, 707 F.3d 1, 6 (1st Cir. 2013) (allowed in context where not "shorthand for 'insulting to the jury's intelligence'" but "in some circumstances [has] the potential to cause impermissible consideration of issues beyond the evidence").

11. Say:

> And let me tell you something about all this to-do about inconsistent statements. That actually shows they were credible. The Government could have put—they could have put all the cooperators in a room and say: Let's get this story straight. Work it out. You guys, all five of you, get in that room and you come out with a story that's consistent. I don't want you leaving that room until the story's consistent so the jury

> knows you're telling the truth.
>
> Of course, the Government knew that the versions were going to conflict. Because that's life. You know, you don't tell a story three years later and have the story miraculously just be the same story unless they've been influenced. Unless, again, they've been put in a room to get their stories straight. And you get in there, you tell the truth. You get in there, you make sure you tell this fabricated story that we have planned.

United States v. Vizcarrondo-Casanova, 763 F.3d 89, 96 (1st Cir. 2014) ("prosecutor unwisely put his toe up to the line," but error "was not 'clear and obvious.'").

12. Use the wording "I submit to you that she was [telling the truth]." The First Circuit has pointed out the ambiguity in the word "submit." In the context of the argument and on "plain error" review, the court concluded it "was likely not vouching, and in any case was not clearly or obviously vouching." United States v. Vázquez-Larrauri, 778 F.3d 276, 285 (1st Cir. 2015).

13. Say that "defense counsel was trying to confuse the jury." United States v. González-Pérez, 778 F.3d 3, 20 (1st Cir. 2015) ("perhaps impolitic" but in the circumstances "did not render the trial unfair").

D. A DEFENSE LAWYER MAY NOT:

1. Invite the jury to make any inference regarding the absence of a witness who refused to testify based upon his/her Fifth Amendment right: "Neither side has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him." United States v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973); see also United States v. Shoup, 476 F.3d 38, 44 (1st Cir. 2007) (quoting Johnson).

2. Argue "that the jury should equate 'reasonable doubt' with 'an abiding conviction to a moral certainty.'" United States v. Ademaj, 170 F.3d 58, 66 (1st Cir. 1999).

3. Urge the jury that the defendants are "simply poor and vulnerable" and to "go after the real drug traffickers." United States v. González-Pérez, 778 F.3d 3, 18 (1st Cir. 2015) ("Neither the court nor counsel should encourage jurors to exercise their power to nullify.").

E. A DEFENSE LAWYER MAY:

1. Comment about his/her own client's testimony even where a co-defendant has not testified, if the testimony benefits the non-testifying co-defendant and if the comment is sensitive to the co-defendant's right not to testify. United States v. Figueroa-Encarnacion, 343 F.3d 23, 33-34 (1st Cir. 2003).